that large portions of the TIC amount reflect embedded costs of various exchange access facilities in excess of the forward-looking costs of transport services. Consequently, the Commission should expeditiously move toward a cost-based alternative.

The most appropriate of the four proposed options in the NPRM, and one fully consistent with the CompTel Court's remand, is to base all rates for use of transport facilities on forward-looking costs and to phase out the recovery of other TIC costs.[49] In particular, TCI proposes that the Commission first determine the rates for each of the components of the ILEC's access network -- local switch, direct-trunked transport, tandem-switched transport, and signaling -- based on forward-looking costs. When rates based on forward-looking costs are established, they will include the forward-looking costs of facilities and services included in the current amount of the TIC. In this manner, the forward-looking costs caused by IXCs' use of ILEC services that are currently recovered in the TIC will be fully recovered in the individual access rate elements. Second, to the extent the Commission wishes to allow the ILECs to maintain current levels of access revenues or to recover "legacy costs," to the extent such costs exist, it can do so by allocating any portion of the remainder to the PIC-based rate element.

Attempts by the Commission to reform the access charge regime, particularly the transport rate structure, without immediate revisions to the TIC would be meaningless. TIC charges collect $2.9 billion dollars -- 70% of all transport revenue and fully 25% of all interstate switched access charge revenues collected from IXCs -- with rates that violate the principles of cost causation.[50] No restructuring of access charges can be a success without correcting this situation.

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[49]NPRM, ¶ 117.

[50]*Id.*, ¶¶ 29, 96.

E. SS7 Signaling

The Commission should reaffirm the unbundling of the SS7 signaling rate structure first approved by the Common Carrier Bureau on March 27, 1996 in response to Ameritech's Petition for Waiver to restructure the manner in which it recovers its SS7 costs. Unbundling is certain to enable customers and potential market entrants to obtain access, through economically sound pricing decisions, to only those elements of SS7 network functions that they require. As compared to the prior regime of bundled rates, unbundling enables SS7 network providers to charge separately for SS7 network services in a manner that more closely reflects the way costs are incurred and that sets the stage for opening access to these networks for a wider range of users. Moreover, the Commission-approved rate structure established by Ameritech, with its four component charges of signal link, STP port termination, signal transport, and signal switching accurately reflects the range of distinct functions performed by SS7 networks.

Signal link costs should continue to be recovered through a flat-rated, distance-sensitive charge. The underlying facility, a dedicated network access line ("DNAL") that connects an SS7 customer's network to a dedicated port on the ILEC's signal transfer point ("STP"), is a facility entirely dedicated to use by that customer. A flat charge would appropriately reflect the NTS nature of the facility, and an airline mileage, distance-sensitive rate element between the SS7 customer and the SS7 network maximizes economic efficiency by assigning all of the costs to the SS7 customer who created those costs.

STP port termination costs should be flat-rated. These costs arise when an SS7 customer provides its own DNAL, requiring a port on the ILEC's local STP that connects the SS7 network to the SS7 customer's DNAL. Under these circumstances, this facility is dedicated to a particular SS7 customer. Accordingly, the Commission should establish a flat rate that assigns the forward-looking costs of this NTS facility to the cost causer, the SS7 customer with its own DNAL.

The Commission appears to have raised a new set of issues regarding the appropriate definition of signal transport. In the NPRM, the Commission implicitly redefines signal transport as follows: "Signal Transport. The circuits that carry SS7 queries between STPs, switches, and SCPs within the incumbent LEC signaling networks are comparable to the shared circuits incumbent LECs use to provide transport between end office and tandem switches."[51] This definition appears to include all links in an SS7 network as part of signal transport. However, in an Order released March 27, 1996, the Commission defined signal transport differently: "Signal Transport Charge: a per-message charge for the transmission of signalling data between a local STP and an end office SSP."[52] A broader definition of signal transport can have a substantial impact on some carriers and should be justified by careful analysis. In the absence of such an analysis, the definition of signal transport should not be changed; it should continue to refer to transport between the end office and the local STP only, and should exclude other links in the SS7 network.

For instance, under the Ameritech tariff, the cost of signal transport (the link between the ILEC end office and the local STP) is recovered from SS7 customers on the basis of separate charges for ISUP and TCAP messages. The cost of other links, particularly the links from Regional STPs to SCPs, are apparently recovered from users of 800 database and LIDB services. Ameritech has stated: "With respect to 800 database and LIDB TCAP messages, Ameritech today recovers all database-related costs and those costs associated with the transport of queries and messages between the database (the Service Control Point or 'SCP') and the Regional STP

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[51] *Id.*, ¶ 131.

[52] See Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signaling, 11 FCC Rcd. 3839, 3845 (1996) ("Ameritech Waiver Order").

('RSTP') via per query charges."[53] The Commission's broader definition of signal transport would shift the burden of costs from carriers who use the SCP and the LIDB intensively to other carriers. This may impede the entry of local exchange service competitors, who are likely to request call termination from ILECs, a service that is likely to use predominantly ISUP messages between local end offices and local STPs. If the price paid for signal transport is to include the costs of links used exclusively or primarily for long distance or value-added calls (such as 800 and credit card calls), the cost of providing competitive local service will be artificially inflated, while the costs of providing other signaling-intensive services will be artificially deflated. In order to avoid raising economically inefficient barriers to local competition, the Commission should retain the definition of signal transport reached in its Order of March 27, 1996.[54]

Signal switching costs, arising from processing and switching by the STP, should be recovered on a per-message basis. The Ameritech tariff distinguishes between signal switching for ISUP messages and TCAP messages. A similar distinction is made for signal transport. In its Order of March 27, the Commission stated that ". . . the average length of a TCAP message is less than the average length of an ISUP message."[55] Despite differences in average packet size, TCI recommends that on an interim basis, ILECs should not be allowed to charge different rates for the two kinds of messages, and that in the longer term, differential charges should be permitted only if they can be rigorously justified on the basis of forward-looking costs.

If message size is truly the cost causer in SS7 networks, then signal switching and signal transport charges should be based on total bytes switched and transported, rather than the number of messages of each type. There is no evidence to suggest that message type correlates well with

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[53] Revised Petition of Ameritech for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signaling, filed May 17, 1995, at 6 ("Ameritech Waiver Petition").

[54] Ameritech Waiver Order, 11 FCC Rcd at 3845.

[55] *Id.* at 3842.

traffic volume. There can be considerable variation in the size of SS7 packets; the ISUP and TCAP message categories each include several types of messages of different lengths. In these circumstances, the variation in the packet length may be as important a cost driver as the mean packet length for ISUP and TCAP packets. In addition, a differential charge for packets of different sizes should be based on a forward-looking model of the cost drivers in a packet network, but such models have not been introduced.

CLECs seeking call termination are likely to generate proportionately more ISUP packets (for call set up) than an ILEC (whose vertical services will generate proportionately more TCAP than ISUP messages) or an established IXC (with proportionately greater 800 and credit card calls). A premium charge for ISUP messages not based on forward-looking costs will inefficiently retard local exchange competition. For this reason, TCI recommends that, for now, charges for ISUP messages be no higher than charges for TCAP messages. The Commission should not permit different charges for the ISUP and TCAP messages until ILECs have established a forward-looking cost basis for this differential.

F. New Technologies

Recent years have indeed brought developments in switching and transmission technologies.[56] In fact, TCI is among the companies pioneering the use of new technology in local exchange services, particularly synchronous optical networks ("SONET").

If a particular technology is used to provide access in a traditional manner, *e.g.*, fiber replacing copper, then the only change to access should occur to the costs with which that technology is associated. On the other hand, if a new technology is in addition to or changes the manner by which access is provided, then the rate elements, the costs flowing from those rate elements, and the resulting rates need to be reflected in the access charge rules. In either case,

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[56]NPRM, ¶ 139.

the Commission can approach the issue on an *ad hoc* basis, but should remain steadfast to the four guiding principles described by TCI above.[57]

G. Regulatory Approach

TCI advocates a combined approach to access reform that incorporates aspects of both the market and prescriptive approaches. Particularly, the Commission should retain current access charge and tariff requirements for market-dominant ILECs, but permit market forces to regulate CLECs.[58] In order to reduce such requirements, if not do away with them altogether, ILECs should be required to first demonstrate that services in certain markets are actually subject to substantial competition.[59] Eventually, competitive market forces will eliminate the need for tariff and price cap regulation of access services. Until the interstate access market is truly competitive, however, it will be necessary for ILECs to remain under access charge regulation.

1) A combined regulatory approach

The Commission pointed out that its ultimate goal in reforming access charges is the development of substantial competition for interstate access services, and it proposes to remove existing price cap and tariff regulation of ILEC access services once substantial competition is present and market forces can prevent ILECs from exercising market power.[60] CLECs and other new suppliers of access services already lack any ability to exercise market power and are fully

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[57] See *supra*, Section E.

[58] NPRM, ¶ 140. As stated supra note 20, because all ILECs incur access costs in the same manner, over the same types of access facilities, the outcome of the NPRM should be equally applicable to price cap and rate-of-return ILECs. In that view, access reform should apply to rate of return ILECs because they will provide the same access as price cap ILECs. Similarly, the regulatory approach applied to price cap ILECs should apply to rate-of-return ILECs because they both hold the same level of market power.

[59] *Id.*, ¶ 149. Such demonstrations should be in accordance with the competitive analysis proposed by the Commission, which was used under similar circumstances to deregulate AT&T's price cap services. See generally Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991) ("Interexchange Order").

[60] *Id.*, ¶¶ 149-150.

constrained by the pressure of market forces.[61] Because new entrants have no market power and do not control essential bottleneck facilities, price and tariff regulation of their access services is neither necessary nor in the public interest.[62]

The marketplace is a more natural and efficient regulator of new entrants.[63] Forbearance from burdensome regulatory requirements for new entrants results in reduced costs and regulatory uncertainty. Reduced costs of providing service in turn encourages investment in telecommunications infrastructures, and results in technical and service innovations, as well as increased customer choice.

The Commission, quite properly, has said that it would be extremely reluctant to impose price regulation on nondominant carriers without a strong showing that such regulation is necessary.[64] Clearly no such showing can be made given the absence of market power of these emerging carriers and the fact that the costs imposed by regulation would hinder their efforts to offer a competitive alternative to ILEC and exchange access services.

In sharp contrast, there should be little dispute that ILECs remain dominant carriers in their respective local exchange areas with the ability to exercise market power as suppliers of switched access services. Market regulation for ILECs, although ideal and the eventual goal, would be insufficient. Competition is only beginning to emerge in the access market, and ILECs continue to enjoy significant competitive advantages as a result of their dominant status. As

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[61] Competitive Carrier, 85 FCC 2d at 20-21 (firms without market power do not have the ability to price services unreasonably and must take the market price as given).

[62] *Id.* at 20 (the Commission concluded that regulatory procedures for nondominant carriers impose unnecessary and counterproductive regulatory constraints upon a marketplace that can behave efficiently without government intervention).

[63] *Id.* at 22.

[64] NPRM, ¶ 278.

such, they have the ability to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest.[65]

2) The proposed market-based approach

The Commission has proposed to reduce regulation in two phases as competitive thresholds are satisfied.[66] These thresholds are at competitive levels that are less than substantial competition. The Commission would implement regulatory reforms for ILECs when there is "potential competition," or at Phase I, when an ILEC has opened its network by removing the most immediate entry barriers.[67] Additional regulatory reforms would be removed when an actual competitive presence has entered the marketplace.[68] The Commission's proposed market-based approach to access charge reform has two serious flaws: it would rely on the uncertain progress of competition to push access charges down from inefficiently high levels, and it would prematurely allow pricing flexibility that would give ILECs both the ability and incentive to price anticompetitively.

As the Commission acknowledges, operation of market forces may not require ILECs to reduce access prices as quickly as a prescriptive approach that requires reductions.[69] The ability of competing carriers to capture market share and put competitive pressure on ILEC prices for switched access service remains to be demonstrated. For instance, the prices at which new carriers will be able to purchase the use of ILEC unbundled network elements are still unfolding. It also remains to be seen whether new carriers will be able to develop the efficient relationships

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[65] Competitive Carrier, 85 FCC 2d at 21 (concluding that a firm with market power has the capability to engage in anticompetitive conduct.).

[66] NPRM, ¶ 161.

[67] *Id.*, ¶ 163.

[68] *Id.*, ¶ 164.

[69] *Id.*, ¶ 143.

with their ILEC "suppliers" that are necessary for effective competitive constraints. Developing efficient vertical relationships between vendor and customer can be difficult for firms in normal commercial circumstances. It will be still more difficult here, where the ILEC vendor will have a near monopoly on the supply of unbundled network elements and is also the dominant incumbent supplier of exchange access services trying to maintain its dominant position in the marketplace.

The second flaw of the market-based approach to reform is that the increased pricing flexibility proposed in Phases I and II would give ILECs the ability, and worse the incentive, to price anticompetitively. The Commission has long recognized that price-capped services facing differing degrees of competition should be separated into different baskets or service categories. If this is not done, incentives are created for anticompetitive pricing since lowering the price for a service facing competition provides room under the price cap to raise the prices of services facing less competition. The proposal to increase ILEC pricing flexibility entails a significant risk of creating such incentives.

Allowing ILECs the flexibility to geographically deaverage access charges or to offer volume and term discounts, effectively would multiply the number of services ILECs offer within existing price cap baskets and service categories. Lowering rates for access services sold to customers in one area, or for those purchased at one level of volume or for one term, would give a price cap ILEC more room under the cap to raise access charges to customers in another area, or who purchase different volumes or under different terms. Yet there is no market evidence or other basis on which to conclude confidently that competitive forces will develop evenly for access services in all areas, at all volumes, and on all terms.

In sum, the availability of unbundled network elements -- even at geographically de-averaged prices -- does not ensure the development of competitive pressure on ILEC prices, or ensure that competitive pressure will develop evenly for a multiplicity of services in different areas and at various volume and term discounts. Nor do the proposed triggers for Phase I and II ensure the even development of competitive pressure. The proposed triggers for Phase I only

indicate the establishment of preconditions that create the *potential* for competition to develop, as the Commission acknowledges. They would not ensure competition or the development of competition at the same pace for all of the many services for which ILECs would be able to set different prices. Similarly, the proposed triggers for Phase II would at best indicate the presence only of some actual competition short of substantial competition.

Also in sum, giving ILECs the proposed pricing flexibility would not promote efficient pricing responses. ILECs would not be constrained to use that flexibility simply to match ILEC prices more closely to differences in the cost of supply in different geographical area or in different volumes and terms. Instead, ILECs would have an incentive to use that flexibility to lower prices below cost where competition is most threatening, while raising prices and increasing their exercise of market power where the prospect of competition is less immediate. Such uses of pricing flexibility would be neither efficient nor pro-competitive, and a "reform" of price caps that encourages it is not in the public interest.

3) Deregulation in the presence of substantial competition

TCI strongly supports the Commission's goals to foster the development of competition for interstate access services and eventually permit market forces to eliminate the need for price regulation of these services. Only to the extent that an ILEC demonstrates that substantial competition exists for a particular service in a particular geographic area should that service be removed from price cap and tariff regulation. In order to determine when substantial competition exists to warrant deregulation of ILECs, the Commission can utilize the same analysis used to assess the level of competition in the long distance market before deregulating AT&T's services.[70]

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[70] *Id.*, ¶ 150.

The Commission has previously undertaken similar efforts when it sought to foster the development of competition in the interexchange service market.[71] The structure of the interexchange market at that time closely resembled that of the current local exchange access market. Competition in the long distance market was only just emerging. Also, like ILECs, AT&T was classified as dominant and subject to price cap and tariff requirements. New entrants were classified as nondominant and were subject to streamlined regulation. When the Commission subsequently amended its regulatory requirements to reflect the changes in the long distance marketplace, it analyzed the level of competition by considering AT&T's market share, demand responsiveness, supply responsiveness, and pricing behavior.[72]

TCI also supports the Commission's proposal to apply the substantial competition analysis on a service-by-service basis.[73] Consistent with regulatory efforts to reduce unnecessary regulation, where there is substantial competition in the provision of a particular service, removal of regulatory constraints is in the public interest. Similarly, services for which ILECs cannot influence price movements should be removed from price cap regulation.[74] The central concern is that ILECs not have the ability to control prices in the market. Absent such ability, regulatory efforts would be better aimed toward services for which ILECs possess market power. Further, as the Commission pointed out, a service-by-service approach would be

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[71] Competitive Carrier, 85 FCC 2d at 2.

[72] Interexchange Order, 6 FCC Rcd at 5882-90.

[73] NPRM, ¶ 151. The geographic area to be used in examining whether a service is subject to substantial competition may be determined on an *ad hoc* basis. Specifically, it would be the burden of the petitioning ILEC to demonstrate that competition exists for a service throughout the particular geographic area for which the ILEC seeks deregulation.

[74] *Id.*, ¶ 152.

consistent with the Commission's approach to removing AT&T's services from price cap regulation.[75]

4) Competitive factors

The Commission's analytical framework used to streamline AT&T's services would appear to be an appropriate method for deregulating ILEC services. The Commission should include as competitive factors demand responsiveness, supply responsiveness, market share, and the number of competing firms in the relevant market.

While demand responsiveness will assist in the determination of the number of comparable access services available to customers, the number of ILEC customers seeking interstate access services is substantially lower than the number of IXC customers seeking long distance services.[76] Nevertheless, as sophisticated telecommunications firms, IXCs are fully capable of evaluating and considering alternative providers of access services.

Supply responsiveness also should be a factor because it would help gauge whether competitors have sufficient capacity to compete with ILECs and whether entry barriers for competitors are low.[77] The market for ILEC services would be substantially competitive if ILECs could demonstrate that competitors have or can acquire sufficient additional capacity to effectively constrain ILEC market behavior and pricing flexibility.[78] In addition, if CLECs are

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[75] *Id.*, ¶ 151.

[76] Interexchange Order, 6 FCC Rcd at 5887.

[77] NPRM, ¶ 157. This factor could be measured using the amounts of raw transmission capacity and the readily available capacity of competitors to compete directly with ILECs for access services as well as an analysis of traffic volumes and peak levels to determine the ability of competing networks to handle ILEC traffic. Interexchange Order, 6 FCC Rcd at 5889.

[78] *Cf.* Interexchange Order, 6 FCC Rcd at 5889.

able to enter the access service market and add to existing capacity, this would also indicate that barriers to entry are low.[79]

Market share should be another factor.[80] However, because ILECs have such high market shares in the access service market, declining market shares should not be automatically considered to lessen their ability to exercise market power. Instead, market share, like all the other competitive factors, is only one indicator of market power and competitiveness.

In accord with the Commission, TCI recognizes that a given market for a service may become competitive only to revert to non-competitive conditions. It is essential that interested parties, including potential competitors, customers, and public authorities, are able to address these concerns before the Commission. TCI believes the complaint process, on an expedited basis, may be adequate for this purpose, at least on an interim basis.

The Commission should not include ILEC below-cap pricing of services as a measure of competition.[81] As the Commission noted, below-cap pricing is not necessarily a reliable measure of competition.[82]

In addition, the Commission should consider the number of competing firms and whether barriers to entry have been eliminated. Given that ILECs are the dominant and often sole exchange carrier in their respective geographic areas, the number of competing firms in an ILEC's geographic area will be indicative of whether ILECs are providing access and interconnection.[83] The number and presence of competing firms could also be used to determine

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[79] *Id.*

[80] NPRM, ¶ 158.

[81] *Id.*, ¶ 159.

[82] *Id.*

[83] Competitive Carrier, 85 FCC 2d at 21 (where the Commission determined that, when a firm has control over essential facilities in its industry, it has the power to impede new entrants).

whether barriers to entry have been eliminated. Some facilities-based competitors should, in fact, be operational in the market in that the ILEC asserts is competitive. If the ILEC remains the only facilities-based carrier, its control over bottleneck facilities would remain unchanged.[84]

Consistent with TCI's proposal for access charge reform, the Commission should retain access charge regulation for all ILECs until the access market is truly competitive. Such regulation should not be relaxed nor eliminated until ILECs demonstrate that substantial competition for particular services exists in particular geographic areas on a service-by-service basis.

H. Universal Service Reform and Double Recovery

The Commission has solicited comments on whether retaining features of the access charge system in light of the possible changes in universal service may compensate ILECs twice.[85] If so, the Commission also has asked parties to suggest how to address double recovery.[86]

Double recovery could result in several ways. Changing support systems would lead to increased recovery for many ILECs because some existing support mechanisms that use access charges as a source of funds would be replaced under the Joint Board's recommendation by support mechanisms that rely on other sources of revenues. For example, carriers that previously used access charge revenues they collected to make payments for explicit or implicit support, such as the old Long Term Support mechanism or geographically averaged rates, respectively, could end up being relieved of this obligation without being required to reduce their access charges.

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[84]The mere leasing of facilities by resale carriers, for example, would simply continue the current dependence upon ILEC facilities.

[85]NPRM, ¶ 244.

[86]*Id.*

TCI supports rate reductions to access charges that reflect the full extent of any cost support such as a downward, exogenous cost adjustment to the CCL charge, or PIC-based charge, for price cap ILECs that reflect the full extent of any reduced obligation to make support payments.

Double recovery issues, however, cannot be resolved by simple reforms that address only the effects of eliminating the use of access charges to fund explicit universal service support mechanisms. Instead, resolving the problem of double recovery will require an overall examination of how reform of universal service support affects ILEC revenue flows. Such an examination will enable the Commission to determine the difference between support amounts received by a carrier under the new and old plans. It should then reduce the interstate access charge revenues by an amount equal to this difference plus the obligation to pay collected access charge revenues to others that is eliminated by the reform of universal service support.

Apart from double recovery issues, universal service reform is important to ensure that the benefits of access charge reform are realized. By eliminating universal service distortions to competition -- by enforcing revenue neutrality -- the Commission would help move rates closer to forward-looking costs, which will lower access charges that much more.

I. Terminating Access

1) Terminating access rate structure

In the NPRM, the Commission suggests that terminating access warrants different regulatory treatment than originating access due to the fact that terminating access providers may maintain a bottleneck regardless of a competitive presence.[87] Specifically, the Commission suggests that originating access can be distinguished from terminating access since, in the case of terminating access, a calling party has "little or no ability to influence the called party's choice of

[87] See NPRM, ¶ 271.

service provider"[88] preventing market forces from influencing terminating access provider rates. Based on this suggestion, the Commission is seeking comment on whether and to what extent terminating access services may warrant additional regulation in order to prevent overcharging by the terminating access provider.[89]

The analysis ignores the called party. Although a calling party may be unable to select a terminating access provider, the called party can exercise its ability to select an access provider that charges reasonable terminating rates. Called parties value receiving calls, as well as placing calls. If they choose an access provider that sets high terminating access charges, that will increase the cost to the calling parties and reduce the number of calls the called party receives, making called parties (as well as calling parties) worse off. In addition, the called party may end up placing and paying for more outgoing calls to compensate for calls no longer received. For these reasons, the Commission should not overlook called parties' interests in choosing access providers that set reasonable rates for terminating access.

TCI notes that high terminating access rates may actually enhance access competition by creating financial incentives for IXCs. In the NPRM, the Commission submits that high terminating access charges may create an incentive for IXCs to win a called party as a local customer.[90] The Commission suggests that, although winning the called party as a local customer would only result in a minimal cost savings with regard to terminating access charges, serving the local customer using unbundled elements would allow IXCs to collect terminating access charges on calls received by the called party.[91] Thus, high terminating access charges

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[88] *Id.*

[89] *Id.*

[90] NPRM, ¶ 272.

[91] *Id.*

could influence the number of access providers available to called parties, thereby enhancing access competition.

2) Regulation of ILEC terminating access charges

The Commission also seeks comment on whether it should continue to provide regulatory oversight of access prices for termination of interstate calls in markets where originating access services are subject to competition.[92] In the NPRM, the Commission notes that terminating access may remain a bottleneck due to a calling party's inability to influence the called party's choice of service provider.[93] The Commission further states that regulatory constraints may be necessary even with a competitive presence in the access market.[94]

As stated above, access providers do not necessarily possess market power over IXCs needing to terminate calls due to the called party's ability to select a terminating access provider. Under such circumstances, competitive pressure may ensure just and reasonable terminating access rates, thereby eliminating the need for continued regulatory oversight. Nevertheless, TCI would urge the Commission to continue its regulation of all ILECs' terminating access rates given their substantial market power. Because ILECs have substantial market power over terminating access, ILEC terminating access should be subject to the same regulatory constraints as ILEC originating access. Also, since terminating access involves the same rate elements as originating access, the same access charge regime that applies to one should apply to the other.

3) Regulation of CLEC terminating access charges

The Commission further requests comments on whether, and the extent to which, it should establish any rules for the provision of terminating access service by CLECs based on the

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[92] *Id.*, ¶ 273.

[93] *Id.*, ¶ 271.

[94] *Id.*

premise that they control a bottleneck facility for such service, *i.e.* the calling party has no option over the terminating carrier but, instead, is subject to the choice of the called party.[95] As stated above, terminating access providers do not necessarily possess market power over IXCs needing to terminate calls due to called parties' ability to select the terminating access provider.

There is also no market evidence to support the proposition that terminating access provided by CLECs is a bottleneck. Such a conclusion requires speculation regarding future market developments and ignores the possibility that the market may respond and eliminate such problems. Mere speculation regarding a potential market problem should not warrant the regulation of new entrants. As the Commission stated in the NPRM, "[n]ew entrants into the exchange access market . . . have been presumptively classified as nondominant because they have been deemed not to have the ability to exercise market power in particular service areas."[96] Regulation of these new entrants is unnecessary since these providers are unable to influence rates in the marketplace. In fact, the Commission stated that it would be extremely reluctant to impose price regulation on CLEC services absent a strong showing that such regulation is needed.[97] Because CLECs lack market power, the Commission should forebear from price regulation for terminating access services on new entrants such as CLECs.

Even assuming, *arguendo*, that CLECs do possess market power, the Commission should nevertheless forebear from regulating CLECs. CLECs should be viewed not solely in light of terminating access, but in the context of their total market, *e.g.*, access and local services.

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[95] *Id.*, ¶ 278.

[96] *Id.*, ¶ 278. As the Commission stated in its Competitive Carrier proceeding, entities that lack market power do not have the ability to charge unlawful rates or otherwise engage in anticompetitive activities. See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Sixth Report and Order*, 99 FCC 2d 1020, 1028 n.29 (1985); Competitive Carrier, 85 FCC 2d at 21.

[97] See NPRM, ¶ 278. CLECs, as new entrants, must be given the regulatory flexibility to respond to demands of the competitive marketplace. See Competitive Carrier, 85 FCC 2d at 30 (describing the regulatory flexibility that non-dominant carriers need in order to adequately compete in the marketplace).

Viewed in this light, they should not be the subject of regulation. Instead, they should be free to grow and flourish. If CLECs eventually obtain market power, then the Commission can revisit the issue at that time.

J. Regulatory Treatment of Originating Access for "Open End" Services

The Commission seeks comment on whether originating "open end" minutes should continue to be treated as terminating minutes.[98] The Commission notes that, in the case of "open end" originating minutes, it is the called party who pays for the call.[99] The called party, however, does not place the call and does not select the originating access provider.[100] Because the called party is therefore unable to control the access provider at the open end, the Commission questions whether originating access rates for "open end" services should be treated as terminating access rates.[101]

This analysis does not take into consideration the calling party's ability to select an originating access provider. Although the party responsible for payment of the call may not be able to influence the originating access provider, the calling party who receives the benefit of that toll-free call can influence their choice of provider thereby creating competitive pressure on the originating end. An access provider charging high originating access charges will discourage businesses from making toll-free numbers available. Under such circumstances, the calling party would lose the benefit of that toll-free number and change to an access provider with lower originating access charges.

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[98] NPRM, ¶ 281.

[99] *Id.*

[100] *Id.*

[101] *Id.*

K. Treatment of Internet and Information Services Providers

TCI supports the comments of the National Cable Television Association ("NCTA") on this issue and incorporates NCTA's position by reference. TCI thus agrees with the Commission's tentative conclusion that Internet and information service providers ("ISPs") should continue to be exempt from the assessment of access charges.[102] Not enough has changed in either the access charge system or the information services industry to warrant reversal of the Commission's exemption policy for ISPs, which the Commission has re-considered and reaffirmed on several occasions.[103] The ISP industry and the Internet both remain in their infancy. Although major IXCs are building ISP networks, there are many small firms serving this developing information services market.

L. Part 69 Revisions

The Commission is seeking comment on whether it should continue to apply the cost allocation rules contained in Part 69, subparts D and E, to ILECs in certain circumstances.[104] Subparts D and E of Part 69 allocate ILEC investments and expenses among the various rate elements.[105] Consistent with the regulatory approach proposed by TCI, the Commission is encouraged to adopt a combined regulatory approach for ILECs until there is substantial competition on a service-by-service basis in a defined geographic market.[106] Premature

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[102]NPRM, ¶ 283.

[103]See, *e.g.*, MTS and WATS Market Structure, 97 FCC 2d 682, 711-22 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988); Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for ONA, 6 FCC Rcd 4524, 4535 (1991).

[104]NPRM, ¶ 294.

[105]*Id.* See generally, 47 C.F.R. §§ 69.301-310 and §§ 69.400-414 (1995).

[106]See *supra* discussion at Section G.

regulatory flexibility could have anticompetitive consequences due to the ILECs' existing market power.[107] Thus, TCI would urge the Commission to retain access charge regulations for all ILECs, including the cost allocation rules contained in Part 69, subparts D and E.

III. Conclusion

TCI firmly believes that these Comments set forth the best approach to access charge reform at this time. They allow the access charge regime to properly reflect costs and cost causation and they take into consideration the transitional needs of the marketplace. This balance will achieve the Commission's access charge reform goals while allowing competitive entry. TCI, therefore, urges the Commission to give them serious consideration.

Respectfully submitted,

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[107] *Id.*